

Re ACC, JGJ and HPP [2020] EWCOP 9 – a practitioner's guide

Background

This guidance has been produced by the Law Society, Solicitors for the Elderly, the Court of Protection Practitioners Association, the Society of Trust and Estate Practitioners and the Professional Deputies Forum.

Summary

The matter of *ACC, JGJ and HPP [2020] EWCOP 9* resulted from the linking of three applications submitted by Irwin Mitchell's Court of Protection team. They were seeking authority for the professional deputy in each application to be able to meet the costs of specified other teams in their firm, who had been advising or performing professional services in relation to P. In two of the applications, authority was sought to meet the parents' costs in instructing their internal education team, and in the third application to meet the costs of a professional deputy to act as litigation friend within personal injury litigation. The questions the Court sought to answer were confirmed at paragraphs 2 and 14 as being: *'whether, and in what circumstances, the deputy can recover from the protected person's assets costs which have been or are likely to be incurred in legal proceedings'* and *'when may a professional deputy instruct a legal firm with which it is associated, and recover the costs from P?'*. The judgement proceeds to give clear examples of when such instructions may, and may not occur with and without express Court of Protection authority, and also, other instances where a professional deputy is required to seek specific authority from the Court of Protection before acting.

Outcomes for professional deputies

1. *What advice can be sought without additional Court of Protection authority?*

A) Property and financial affairs advice

Is there a general authority to take advice?

Where seeking advice on a matter is an *'ancillary part'* [paragraph 53.6] of giving effect to the authority given to a deputy within their order, specific authority to take that advice internally is not required, provided that certain conditions are met. Senior Judge Hilder stated at paragraph 53.8 that that *'the deputy's approach should be to ask themselves if the subject of the advice is within their authority ie will their existing authority be sufficient to act on the advice if taken? If it is, then seeking advice is likely to be an 'ordinary' part of that function. If it is not, seeking advice is likely to be outside their authority.'*

By way of example, this means that authority to sell or purchase property includes authority to instruct a conveyancer, authority to let property includes dealing with those leases, and applying P's funds to meet the costs of care authorises dealing with employment contracts.

What conditions are there on instructing one's own firm to give general advice?

- i. The matter does not qualify as litigation (see below); and
- ii. The matter is a property and affairs matter that falls within the deputy's general authority to act and take advice; and
- iii. The advice is proportionate to P's estate and the importance of the issue to P; and
- iv. *Either:*

- i. Three quotations have been obtained from suitably qualified and appropriate advisors for comparison; and
- ii. Legal fees incurred will be specifically accounted for in the OPG report and decision making notes appended to the report; and
- iii. Anticipated costs for this issue (eg employment advice) do not exceed £2,000 plus VAT for that deputyship year; and
- iv. The deputy considers that it is in P's best interests to proceed with their own firm.

or

- i. Costs will be limited to fixed rates or subject to SCCO assessment [paragraph 53.10]; and
- ii. Conflict of interest issues can be overcome without the need for recourse to obtaining quotations from other firms [paragraph 56.7]; and
- iii. The deputy considers that it is in P's best interests to proceed with their own firm.

Where the first option above is taken and the costs are likely to exceed £2,000 for that matter, then specific authority must be obtained from the Court of Protection to instruct the deputy's own firm to give that advice. The application would need to detail the deputy firm's offering alongside two other options, and provide evidence as to why it would be in P's best interests to instruct the deputy's firm. Alternatively, the deputy may instruct an external firm without authority from the Court of Protection.

B) Health and welfare advice

Is there a general authority to take advice on health and welfare issues?

The Court has been eminently clear in confirming that a property and affairs deputy's authority only relates to property and affairs. Therefore a property and affairs deputy has no authority to act or instruct anyone to act in a health and welfare matter, without authority from the Court of Protection [paragraph 54.6].

The deputy's authority to act or seek advice in a health and welfare matter without additional authority only extends to bringing the Court's attention to the fact that there is or may be a welfare issue for determination, by seeking directions as to how that potential issue may be addressed. The Court confirmed at paragraph 52.11 that any application made to bring an issue to the Court's attention *'will need to include an explanation of the issue on which the need for proceedings has been identified and the importance of the issue to P. If the deputy seeks authorisation to conduct the proceedings on behalf of P, the application should also include a summary of P's estate, an estimate of costs as far as the stage for which authority is sought, and an explanation of why it is considered that the property and affairs deputy is most appropriately placed to bring the application/conduct the proceedings on behalf of P'*. The application will then be considered by the Court.

C) Special Educational needs / EHC Plans

In these cases, the client for the purposes of obtaining legal advice is:

- The parents – where P is a child
- The young person themselves where they have reached the end of the academic year in which they turn 16

- Where the young person lacks capacity, their 'alternative person' who will be their parent unless there is a deputy or attorney appointed to make decisions relating to special educational needs matters.

Accordingly, it is the parent (or where they have capacity, the young person themselves) that is obtaining the advice and not the Deputy. The Deputy must apply to the Court for authority to pay the parent (or any other third party's) legal costs.

2. *Can a deputy litigate without additional Court of Protection authority?*

Where the application is a property and affairs application in the Court of Protection, no additional authority to issue proceedings will be required [paragraph 52.4].

Beyond this, specific authority to litigate is required. However, the Court has given deputies a level of flexibility to seek advice on a matter that may need litigating, within the general authority to seek advice.

What constitutes 'pre' litigation?

Where the matter relates to property and financial affairs, and the taking of legal advice on behalf of P is in relation to something that falls within the deputy's general authority (ie taking advice on employment contracts, tenancy agreements etc), general advice can cover a letter before claim, counsel's initial advice on the matter, and a letter of defence. It falls short of formal issue of proceedings. This advice can be sought without additional authority, provided that the costs for the seeking of that advice complies with guidance above about when and how general advice can be sought.

What constitutes 'litigation'?

Litigation is defined at paragraph 54 of the judgement as the issuing of proceedings, or the issuing of an appeal for issues that were previously routine (eg a Continuing Healthcare application).

What does the judgment say about acting as a litigation friend?

Where the Court of Protection, pursuant to section 18(k), authorises a person to conduct proceedings in the name of and on behalf of P, that person can generally act as litigation friend within civil or family proceedings without obtaining any further permissions of the court seized of those proceedings, pursuant to the Civil Procedure Rules Part 21.4(2) and FPR Part 15.4(2). However, the ultimate control as to who acts as litigation friend lies with the court seized of the proceedings and even if the Court of Protection has granted a person authority to conduct proceedings, the court seized of the proceedings can discharge them from that role [paragraph 43].

In cases where there may be difficulty in terms a conflict of interest as a result of the litigation friend's employment by the deputy's firm, the Court suggest that it may be preferable for the Official Solicitor to act in that role instead where their conditions to act are met [paragraph 15.10].

It is worth bearing in mind the Court's view that if a person has capacity to instruct in a particular matter, they also probably have capacity to make decisions about costs in a particular matter [paragraph 59.3].

3. *Does seeking advice on Continuing Healthcare funding or EHCPs fall within a deputy's general authority, health and welfare or litigation?*

The Court expressly considers this at paragraph 54.8 and confirms that:

- i) A professional deputy can apply for continuing healthcare funding, and seek advice on any appeal without additional authority. However, this only extends to the drafting of a letter of appeal. From the moment a letter of appeal is delivered, specific authority would be required, as it would constitute litigation.
- ii) Applying for an EHCP is a health and welfare matter, and authority must be sought to do so. Any appeal of the same constitutes litigation.

4. When should a professional deputy obtain authority to act or litigate?

Authority to act / instruct a member of an associated firm should be sought before the instruction to the advisor is made. If this is not possible, then a deputy can proceed with the instruction or litigation, and then make a retrospective application for authority to incur costs, but they do this at risk on costs [paragraph 55]. There is nothing preventing a deputy from making multiple applications for authority about a client within one application, provided suitable evidence is exhibited. Further, if it is known prior to appointment as deputy that authority to appoint advisors or litigate will be required, an application for authority can be made within the deputyship application.

The Court cannot give any general and prospective assurance of the outcome of any application for retrospective approval; the court's determination of applications must be made in the best interests of P [paragraph 55].

When making an application for retrospective approval, the deputy will need to explain why a matter was so urgent that authority could not be sought prospectively. The length of time between taking the urgent action and making the application for retrospective approval is likely to be a relevant consideration [paragraph 56].

5. How should a professional deputy obtain authority to act or litigate?

Any discrete application for authority to act should be made under the streamlined application procedure for an existing deputy, exhibiting forms COP1, COP1E and COP24 (<https://www.judiciary.uk/wp-content/uploads/2015/06/pd-9d-applications-in-relation-to-property-affairs.pdf>). The usual application fee applies.

However, this shorted process is not authorised where permission to litigate is sought. In that situation, a full application using forms COP1, COP1A, COP3 and COP24 must be used.

In the situation of an urgent injunction being sought on P's behalf, the deputy should clearly indicate their exposure and seek urgent consideration by the Court [paragraph 55].

6. Can a deputy meet the legal costs of a third party?

The judgement is clear at paragraph 57 that a deputy's authority does not extend to paying the legal costs of any family member or related party, and if this is suggested, then specific authority must be obtained by the deputy in the above manner. This would apply to cases relating to EHCPs.